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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1976

NO. **76-1222**

NEW PITTSBURGH COURIER
PUBLISHING COMPANY, Petitioner

v.

RICHARD F. JONES, RECEIVER OF PITTSBURGH
LIQUIDATING CORPORATION, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA**

The New Pittsburgh Courier Publishing Company, petitioner herein, prays for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion, concurring opinion and dissenting opinion of the Supreme Court of Pennsylvania, are not yet officially reported and are reproduced as Appendix A. The Adjudication of the Chancellor of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, also not officially reported, as well as the final decree entered by the Court *en banc* are reproduced as Appendix B.

Questions Presented for Review.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 8, 1976. A timely application for reargument was filed by petitioner on October 21, 1976 and was denied by the Supreme Court of Pennsylvania on December 8, 1976 (Appendix C) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether state law must be applied in determining who is the "possessor" (of intangible personal property consisting of an obligation owed to a delinquent taxpayer) entitled to Notice of Seizure within the meaning of Section 6335(a) of the Internal Revenue Code, 26 U.S.C. §6335(a), when Section 6335(a) and other sections of the Internal Revenue Code, specifically Section 6332(a), 26 U.S.C. §6332(a) makes it clear that the "possessor" of such property is one who is obligated with respect to it?

2. Whether under Section 6335(a) of the Internal Revenue Code, 26 U.S.C. §6335(a), the Notice of Seizure of personal property owned by a delinquent taxpayer must be given to the owner when the personal property in question is intangible and consists of an obligation to the delinquent taxpayer owed by the debtor upon whom Notice of Seizure has been served?

3. Whether a tax sale under Section 6335 of the Internal Revenue Code, 26 U.S.C. §6335 by the Internal Revenue Service of property owned by a delinquent taxpayer is invalid because Notice of Seizure of that prop-

Questions Presented for Review.

erty was not personally served upon the delinquent taxpayer, where the delinquent taxpayer did receive proper Notice of Sale prior to the sale and where no prejudice to the delinquent taxpayer has been shown by virtue of the sale?

4. Whether a delinquent taxpayer who asserts that his personal property was improperly sold by the Internal Revenue Service at a tax sale conducted pursuant to the levy, seizure and sale process set forth in Sections 6331 through 6343 inclusive of the Internal Revenue Code, 26 U.S.C. §6331-§6343, inclusive, has any direct recourse against the purchaser of that property in an action commenced against that purchaser more than four years after the tax sale?

Statutes and Regulations Involved.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations of the Internal Revenue Code, all reproduced as Appendix D, are as following:

26 U.S.C. §6331(b)(c)

26 U.S.C. §6332(a)

26 U.S.C. §6335(a)(b)

26 U.S.C. §6337

26 U.S.C. §6338

26 U.S.C. §6339(a)(1, 2)

26 U.S.C. §6343(b)

26 U.S.C. §6532(c)

26 U.S.C. §7426(b)(2)

IRS Reg. §301.6331-1(a)(1)

Statement of the Case.

STATEMENT OF THE CASE

On October 15, 1966, petitioner, the New Pittsburgh Courier Publishing Company (hereinafter the "New Courier") and the Pittsburgh Courier Publishing Company (hereinafter the "Old Courier") now known as Pittsburgh Liquidating Corporation, of which respondent is the court-appointed receiver, made an agreement which provided, *inter alia*: (1) The Old Courier would convey its assets to the New Courier; (2) The Old Courier would change its name to Pittsburgh Liquidating Corporation for the purpose of winding up the Old Courier's affairs; and (3) The New Courier would pay one-half of its net profits, as defined by the agreement, to Pittsburgh Liquidating Corporation for the next ten (10) years. Prior to the transfer, the assets of the Old Courier were subject to IRS liens for delinquent taxes and after the transfer the assets remained encumbered by the IRS liens, a fact recognized by the agreement. The New Courier agreed to supply periodic financial reports to the IRS, as the fifty (50%) percent interest in future profits would first be used to pay the tax debt of Pittsburgh Liquidating Corporation.

The New Carrier, however, failed to make a profit during its early existence. In 1967, upon petition of a stockholder of Pittsburgh Liquidating, the Court of Common Pleas of Allegheny County named respondent the receiver of the company.

By October 1968, the New Courier had not shown a profit, and the IRS decided to proceed with the sale of the encumbered assets. On December 17, 1968, the IRS levied on all encumbered assets and left a Notice of Seizure at the office of the New Courier. One of the assets was described in the Notice of Seizure as:

Statement of the Case.

"That portion of the interest in said contract of October 15, 1966 for the payment of one-half of the net profits by the New Pittsburgh Courier Publishing Company to the Pittsburgh Liquidating Corporation for a period of ten (10) years."

On December 30, 1968, the IRS conducted an administrative sale at which the New Courier purchased all of the assets, including the interest in the contract.

On January 12, 1973, respondent filed a complaint in equity seeking an accounting of the New Courier's profits in accordance with the 1966 agreement. At a pretrial conference and at the commencement of trial, various issues were raised, including defendant's contention that the Court was without jurisdiction of the subject matter; however the chancellor directed the parties initially to litigate only the issue of the validity of the IRS sale. If the tax sale was valid, respondent no longer had any rights under the 1966 agreement. On July 10, 1974, the chancellor filed his decree nisi, finding a valid tax sale and dismissing respondent's complaint. Exceptions were filed and on February 3, 1975, the Court *en banc* dismissed respondent's exceptions and entered a final decree, affirming the chancellor's decree nisi.

In an opinion filed on October 8, 1976, the Supreme Court of Pennsylvania vacated the decree entered by the chancellor and held that the tax sale was invalid. In reaching its decision, the Supreme Court of Pennsylvania cited the case of *Aquilino v. United States*, 363 U.S. 509 (1960) as standing for the proposition that state law must be applied to determine the identity of the "possessor" within the context of Section 6335(a)

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of the Internal Revenue Code, of the assets which were the subject of the December, 1968 tax sale. It then found that the Old Courier, not the New Courier, was the possessor for purposes of the Section 6335(a) Notice of Seizure and having done so, concluded that Notice of Seizure was not given to the possessor, the Old Courier, in accordance with Section 6335(a)'s direction and, therefore, that the tax sale of the Old Courier's assets was invalid.

REASONS FOR GRANTING THE WRIT

I. The Holding of the Supreme Court of Pennsylvania Is Premised Upon a Serious Misapplication of a Decision of This Court to Arrive at its Erroneous Conclusion That It Must Apply State Law to Determine Who Was the "Possessor" of Personal Property Within the Context of Section 6335(a) of the Internal Revenue Code for the Purpose of Determining to Whom Notice of Seizure Must Be Given.

The case of *Aquilino v. United States*, 363 U.S. 509 (1960) cited by the Supreme Court of Pennsylvania stands for the proposition that in determining whether and to what extent a taxpayer had property or rights to property to which a federal tax lien could attach both federal and state courts must look to state law. 363 U.S. 512, 513. However, it does not stand for the proposition that the courts must apply state law to determine who was the "possessor" of property for purposes of Section 6335(a) of the Internal Revenue Code, where the tax lien has admittedly attached to property of the delinquent taxpayer. *Aquilino v. United States*, 363 U.S. 509 says quite the opposite:

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"However, once the tax lien has attached to the taxpayer's state-created interests, we enter the province of Federal law . . ." 363 U.S. at 513-514.

Therefore, once it is determined that the tax lien has attached to the property of a taxpayer (a fact not in dispute in the present case), the rule enunciated by this Court as restated in *Bank of Nevada v. United States*, 251 F.2d 820, 824 (9th Cir. 1958) applies:

"The Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory."

To permit states to do what Pennsylvania has done, apply state law to determine the identity of the possessor on whom Notice of Seizure must be served, would expose the Federal revenue raising process to the possibility of having as many different procedures for collecting Federal taxes as there are states, an obviously absurd result.

Reasons for Granting the Writ.

II. The Holding of the Supreme Court of Pennsylvania Contradicts Specific Provisions of Sections 6331, 6332 and 6335 of the Internal Revenue Code, Which Require That Notice of Seizure Under Section 6335(a) of Intangible Personal Property in the Nature of a Debt or Obligation Be Served Upon the Debtor or Obligor.

A "seizure" under the Internal Revenue Code is a levy, 26 U.S.C. §6331(b). Furthermore, under the Internal Revenue Code, levy may be made by serving "Notice" on any person in possession of, or obligated with respect to property or rights to property subject to levy including receivables, bank accounts, evidences of debt, etc. Reg. §301.6331-1(a)(1). See also, 26 U.S.C. §6332(a).

The Pennsylvania Supreme Court in holding that the owner must receive the Notice of Seizure of intangible personal property under Section 6335(a), as well as the Notice of Sale of that property under Section 6335(b), ignores the purpose of the Notice of Seizure, which is to seize a delinquent taxpayer's property so that it can be sold [a fact borne out by the crucial difference in language between Section 6335(a)'s Seizure Notice and Section 6335(b)'s Sale Notice regarding people upon whom these notices may be served]. A seizure can best be done by serving the obligor with Notice; however, the opinion of the Pennsylvania Supreme Court frustrates and undermines the revenue raising process of the Federal Government by directing the Internal Revenue Service to serve the Seizure Notice upon the very party, the delinquent taxpayer, with whom the Government's interest would be least secure. It is clear that the Government's interest would be better secured

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by service of the Seizure Notice on another person, the "possessor" of the obligation to make payment as opposed to the delinquent taxpayer whose property is being sold and who would receive Notice of Sale in any event. See *United States v. Eiland*, 223 F.2d 118 (4th Cir. 1955) for discussions relating to the nature of the tax collection process and *United States v. Barker*, 309 F. Supp. 1369 (W.D. Va. 1970) for proper service of notice.

III. There Is a Conflict Among the Courts of Appeals Over Whether the Notice Requirements of Section 6335 Are Mandatory and if Not Literally Followed, Invalidate All Federal Tax Sales Undertaken Pursuant to Defective Notice.

The Pennsylvania Supreme Court in arriving at its decision cited the Fifth Circuit case of *Reece v. Scoggins*, 506 F.2d 967 (5th Cir. 1975) on behalf of the proposition that the notice requirements of 26 U.S.C. §6335 are mandatory, require literal compliance, and if not followed, invalidate a tax sale undertaken pursuant to defective notice. However, *Reece, supra*, involved a defective Notice of Sale, not a Notice of Seizure. Moreover, the Fourth Circuit in *Johnson v. Gartlan, Jr.*, 470 F.2d 1104 (4th Cir. 1973) held that a tax sale could be (and in that case was) valid even though the notice requirements of Section 6335 were not met. Therefore, it has not been clearly established that the notice requirements of Section 6335 are "mandatory" so as to invalidate a sale in which they were not followed. This is particularly true of a case, such as the instant one, where the delinquent taxpayer had Notice of Sale, a fact which the concurring opinion of the Supreme Court of Pennsylvania in Footnote 1 recognizes.

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IV. The Holding of the Supreme Court of Pennsylvania Ignores the Provisions of the Internal Revenue Code That a Delinquent Taxpayer Does Not Have Any Recourse Against a Purchaser of Personal Property at a Tax Sale, Especially in an Action Commenced Against That Purchaser More Than Four Years After the Tax Sale and, Therefore, Because This Issue Was Presented to the Supreme Court of Pennsylvania, Its Decision by Implication Nullifies Provisions of the Internal Revenue Code.

Section 6339(a)(2) of the Internal Revenue Code in clear and unmistakable language provides that the certificate of sale of personal property (as opposed to that of real property) shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold.

Furthermore, the statutory framework inherent in the Internal Revenue Code and particularly §§6337, 6339, 6343, 6532 and 7426, (26 U.S.C. §§6337, 6339, 6343, 6532 and 7426), not only fails to provide a delinquent taxpayer whose property may have been wrongfully sold at a tax sale with a remedy against the innocent purchaser, but clearly points to the conclusion that no such remedy exists, particularly in an action instituted more than four years after the sale. Section 6337 which is addressed to a delinquent taxpayer's right of redemption of real property is silent as to any right of redemption of personal property and specifically limits the right of redemption of real property to a period within 120 days after sale. 26 U.S.C. §6337(b)(1).

The statutory provision clearly indicates that in the case of real property the certificate does not itself effectively convey title to the real estate, which con-

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veyance is by way of deed after the expiration of the 120 day period for redemption. 26 U.S.C. §6338. This is to be contrasted with the fact that as to personal property the certificate does act, of itself, as the immediate instrument of conveyance of title. 26 U.S.C. §6339.

It is submitted, therefore, that a taxpayer is given no remedy against the bona fide purchaser of his personal property at a tax sale. The taxpayer's remedy, if any, is against the United States. Certainly, it could not exist against the innocent purchaser years after the sale has occurred. Petitioner's conclusion is further supported by the fact that an innocent party whose property was wrongfully levied upon and sold by the Internal Revenue Service, must exercise his remedy within nine months. 26 U.S.C. §§6343(b), 6532(c) and 7426. Moreover, 26 U.S.C. §7426(b)(2), in the case of a wrongful levy, authorizes the return of the property if it is in the possession of the United States and if it is not, provides for a money judgment, thus reinforcing the conclusion that once the property has been transferred to a bona fide purchaser, the taxpayer loses his right to get his property back.

It is clear that the rights of a delinquent taxpayer should not and cannot be viewed more favorably than those of a party not owing a tax obligation whose property was wrongfully levied upon and sold by the Internal Revenue Service. The very fact that the cited Code provisions are silent as to a right of an innocent party to recover personal property wrongfully sold to a bona fide purchaser as opposed to proceeding against the United States only reinforces the conclusion that a delinquent taxpayer has no remedy against the bona fide purchaser of personal property at a tax sale. Therefore,

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a tax sale cannot be invalidated with respect to the purchaser of the assets sold at the sale.

The sound reason for prohibiting a taxpayer from proceeding against the purchaser of personal property should be obvious. The government must be able to present and convey good title to a third party who purchases the delinquent taxpayer's property; otherwise the fear of having his ownership interest divested in a suit instituted years after the event, might deter potential purchasers and thereby impede and interfere with the tax collection processes of the Internal Revenue Service.

Notwithstanding the fact that the above argument was presented to the Supreme Court of Pennsylvania by Petitioner in its brief filed with that Court, that Court's opinion never addressed this issue.

*Conclusion.***CONCLUSION**

A Petition for a Writ of Certiorari should be granted. This case is one of first impression insofar as it is specifically addressed to the issue on whom a Notice of Seizure should be served in the case of a seizure of intangible personal property. It also is important insofar as it affords this Court the opportunity to resolve the matter of whether a tax sale of personal property must be subsequently invalidated because of an alleged technical defect in serving notice where no prejudice has been shown by the delinquent taxpayer. Finally, it affords this Court the opportunity to clarify a complex tax sale procedure which is now made more cumbersome and onerous by an ill-conceived decision.

Respectfully submitted,

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APPENDIX A

[J347]

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

RICHARD F. JONES, Receiver of
Pittsburgh Liquidating Corporation,
Appellant
v.
NEW PITTSBURGH COURIER PUBLISHING
COMPANY, a Pennsylvania Corporation

No. 135
March Term,
1975

Appeal from the Final Decree of the Court of Common
Pleas, Civil Division, of Allegheny County, at No. 261
April Term, 1973—Equity

Opinion of the Court

Filed: October 8, 1976

O'BRIEN, J.

This appeal arises from a final decree in equity which dismissed the complaint of appellant, Richard Jones, who sought an accounting from appellee, the New Pittsburgh Courier Publishing Company (the "New Courier"). Appellant is the court-appointed receiver of Pittsburgh Liquidating Corporation, formerly the Pittsburgh Courier Publishing Company (the "Old Courier"). In 1966, the Old Courier sold the New Courier all of its assets for fifty percent of the New Courier's profits until 1976.

The facts surrounding this appeal are as follows. The Old Courier, a prominent black newspaper, had serious financial problems. Out of a total debt of over one million dollars, the newspaper owed the Internal

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Revenue Service ("IRS") more than one hundred thousand dollars in unpaid taxes by 1966. Pursuant to the collection provisions of the Internal Revenue Code¹, the IRS obtained liens on all of the Old Courier's assets and was preparing to sell all of the assets to collect part of the unpaid tax bill. At the urging of members of the black community, the IRS agreed to postpone the sale so that a plan could be arranged that would allow the paper to continue operating.

On October 15, 1966, appellee and the Old Courier completed an agreement which provided, *inter alia*:

- (1) The Old Courier would convey its assets to the New Courier;
- (2) The Old Courier would change its name to Pittsburgh Liquidating Corporation for the purpose of winding up the Old Courier's affairs; and
- (3) The New Courier would pay one-half of its net profits, as defined by the agreement, to Pittsburgh Liquidating for the next ten years. The assets transferred to the New Courier remained encumbered by the IRS liens. The New Courier agreed to supply periodic financial reports to the IRS, as the fifty percent interest in future profits would first be used to pay the tax debt of Pittsburgh Liquidating.

The New Courier, however, failed to make a profit during its early existence. In 1967, upon petition of a stockholder of Pittsburgh Liquidating, the Court of Common Pleas of Allegheny County named appellant the receiver of the company.

By October, 1968, the New Courier had not shown a profit, and the IRS decided to proceed with the sale of the encumbered assets. On December 17, 1968, the IRS

1. 26 U.S.C.A. §6301, et seq.

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levied on all encumbered assets and left a Notice of Seizure at the office of the New Courier. One of the assets was described in the Notice of Seizure as:

"That portion of the interest in said contract of October 15, 1966 for the payment of one-half of the net profits by the New Pittsburgh Courier Publishing Company to the Pittsburgh Liquidating Corporation for a period of ten (10) years."

On December 30, 1968, the IRS conducted an administrative sale at which the New Courier purchased all of the assets, including the interest in the contract.

On January 12, 1973, appellant filed a complaint in equity seeking an accounting of the New Courier's profits in accordance with the 1966 agreement. At a pre-trial conference, the chancellor directed the parties initially to litigate the issue of the validity of the IRS sale.² If the tax sale was valid, appellant no longer had any rights under the 1966 agreement. On July 10, 1974, the chancellor filed his decree nisi, finding a valid tax sale and dismissing appellant's complaint. Exceptions were filed and on February 3, 1975, the court en banc dismissed appellant's exceptions and entered a final decree, affirming the chancellor's decree nisi.

Appellant argues that the IRS failed to comply with the mandatory notice requirements of the Internal Revenue Code concerning the sale of seized property. We agree and reverse.

2. This determination is incident to the principal action for an accounting under the 1966 agreement. The court must apply Federal Law in determining the tax sale's validity. See *Popp v. Eberlein*, 409 F.2d 309 (1969); Article VI, Clause 2, U.S. Const.

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The Internal Revenue Code provides, in relevant part:

"... As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made...." 26 U.S.C.A. §6335(a). (Emphasis supplied.)³

To validate the sale in question, we must find that the IRS gave Notice of Seizure to the possessor of the interest in the 1966 agreement.

In the instant case, the personal property is the right to receive payment of one-half of the New Courier's profits.⁴ The chancellor determined that since the New Courier would have to pay one-half of its net profits (should any exist) to appellant, the New Courier

3. The Internal Revenue Code further provides for a Notice of Sale, 26 U.S.C.A. §6335(b). Both the Notice of Sale and the Notice of Seizure must be given before the IRS can conduct a valid tax sale. See *Pargament v. Fitzgerald*, 272 F.Supp. 553 (S.D.N.Y. 1967).

4. It is necessary to distinguish between the right to receive future profits and the future profits themselves. Although not raised by appellant, the IRS could neither levy nor sell the indefinite and unascertainable future profits. The regulations to the Internal Revenue Code provide:

"A levy extends to . . . obligations which existed at the time of levy. Obligations exist when the liability of the obligor is fixed and determinable...." 26 CFR 301.6335-1(1) (Emphasis supplied.)

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was the possessor of appellant's interest in the 1966 agreement. We do not agree with this proposition.

When determining the nature of legal interests an individual has in property in the application of the Internal Revenue Code, both state and federal courts must apply state property law. *Aquilino v. United States*, 363 U.S. 509 (1960). This Commonwealth recognizes that an obligor of a contract possesses no proprietary interest in that contract. As this court stated in *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 299, N. 1, 32 A.2d 227 (1943):

" 'Debts . . . are not property of the debtors; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property....' State tax on Foreign-Held Bonds, 82 U.S. 300, 320 (1872)."

Pennsylvania does not recognize that the New Courier had a possessory right in appellant's property, i.e., the right to receive one-half of the New Courier's profits under the 1966 agreement. The Notice of Seizure left with the New Courier failed to comply with the mandate of the Internal Revenue Code, because the New Courier was not the possessor of the personal property in question.⁵

Once state law has been applied to determine the nature of proprietary interests, state and federal courts must look to federal law for the consequences of ineffective notice. See *Popp v. Eberlein*, *supra*. The notice requirements of 26 U.S.C.A. §6335 are mandatory and re-

5. Mr. John Mamula, revenue officer of the IRS, testified that the New Courier received the sole Notice of Seizure.

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quire literal compliance. *Reece v. Scoggins*, 506 F.2d 967 (1975). Since the IRS failed to comply with the notice requirements as to the interest in the 1966 agreement, the sale of that property is invalid.⁶

In the instant case, the chancellor decided the tax sale was valid and thus dismissed appellant's complaint. Having determined otherwise, the chancellor's decree is vacated.

Decree vacated. Case remanded for proceedings consistent with this opinion.

Mr. Chief Justice Jones did not participate in the consideration or decision of this case.

Mr. Justice Pomeroy filed a concurring opinion in which Mr. Justice Nix joined.

Mr. Justice Roberts filed a dissenting opinion.

6. We express no opinion concerning the other assets sold at the tax sale because that question is not before us.

Concurring Opinion.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

RICHARD F. JONES, Receiver of
Pittsburgh Liquidating Corporation,
Appellant
v.
NEW PITTSBURGH COURIER PUBLISHING
COMPANY, a Pennsylvania Corporation

No. 135
March Term,
1975

Appeal from the Final Decree of the Court of Common
Pleas, Civil Division, of Allegheny County, at
No. 261 April Term, 1973—Equity

Concurring Opinion

Filed: October 8, 1976

POMEROY, J.,

I agree with the Court that the federal tax sale involved in this case was invalid because the Internal Revenue Service, although it did in fact give *notice of the tax sale* as required by Section 6335(b) of the Internal Revenue Code of 1954,¹ nevertheless failed to

1. The Internal Revenue Service mailed a notice of sale, dated December 19, 1968, to the last known address of the taxpayer, the Pittsburgh Liquidating Corporation. Section 6335(b) of the Internal Revenue Code of 1954, providing for notice of sale, states that such notice shall be given "in the manner prescribed in subsection (a)...." Section 6335(a) provides in part: "If the owner cannot be readily located, or has no dwelling or place of business within such [internal revenue] district, the notice may be mailed to his last known address." In this case, the Old Courier ceased

Concurring Opinion.

comply with the mandatory *notice of seizure* requirement of Section 6335(a) of the Code. *Johnson v. Gartlan*, 334 F.Supp. 438 (E.D.Va. 1971), *rev'd. on other grounds*, 470 F.2d 1104 (4th Cir.), *cert denied*, 414 U.S. 865 (1973). I append this concurrence to suggest that our disposition of this appeal does not end this case. As a result of pretrial conferences the Chancellor limited the issue to be litigated in the first instance to the validity of the tax sale. Appellee, the "New Courier", however, raised several defenses in its answer and new matter, including that of laches.² The invalidity of the sale having now been established, the trial court should proceed to consider the other issues raised by the pleadings but not decided at the initial trial.

MR. JUSTICE NIX joins in this concurring opinion.

doing business as of October 15, 1966 and its successor, the Pittsburgh Liquidating Corporation, apparently did not maintain an office. Thus the mailing of the notice of sale to the Old Courier's last known address fully complied with the statutory requirement of section 6335(b).

2. The tax sale was held on December 30, 1968 and appellant, the receiver of the Pittsburgh Liquidating Corporation (formerly the "Old Courier"), did not institute the present proceeding challenging the legality of the sale until January 12, 1973.

Dissenting Opinion.

IN THE
SUPREME COURT OF PENNSYLVANIA
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April Term, 1973—Equity.

Dissenting Opinion

Filed: October 8, 1976

ROBERTS, J.

In sustaining the validity of the federal tax sale, the chancellor found that the Internal Revenue Service had complied with the notice requirements of section 6335(a) and (b) of the Internal Revenue Code of 1954. Despite the finding of the chancellor, which was affirmed by the court en banc, the majority reverses the decree because it concludes that the Internal Revenue Service failed to comply with the mandatory notice of seizure requirement of section 6335(a). The majority decides as a matter of law that appellant was entitled to notice of seizure. It then concludes that appellant did not receive notice, a finding properly for the fact-finding court. Although the chancellor found that the notice requirements were fully complied with, he made no

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Adjudication.

specific findings with respect to who was entitled to notice of seizure or whether notice was received by the proper party.

Because of the inconclusiveness of the record, I would vacate the decree and remand for further proceedings on the notice of seizure issue. On remand, appellee should also be permitted to litigate those defenses which were offered but not resolved by the chancellor during the initial proceeding challenging the validity of the tax sale.

APPENDIX B
IN THE
COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY PENNSYLVANIA
CIVIL DIVISION

RICHARD F. JONES, Receiver of
Pittsburgh Liquidating Corporation,
Plaintiff
v.
NEW PITTSBURGH COURIER PUBLISHING
COMPANY, a Pennsylvania corporation,
and
PUBLISHERS SERVICE SYNDICATE, INC.,
an Illinois corporation,
Defendants

No. 261
April Term
1973
In Equity

Adjudication

MCLEAN, J.

Plaintiff has filed this action in equity seeking an accounting from the defendants under a written agreement dated October 15, 1966 between the Pittsburgh

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Courier Publishing Company as seller and defendant Publishers Service Syndicate Inc., as buyer, the buyer having assigned its rights and obligations under the agreement to defendant New Pittsburgh Courier Publishing Company, hereinafter referred to as New Courier. Pittsburgh Liquidating Corporation, of which plaintiff is receiver, is the new name of Pittsburgh Courier Publishing Company, seller under the said agreement. The written agreement of October 15, 1966 includes among its provisions the obligation to pay to Pittsburgh Liquidating Corporation fifty percent of the net profits earned by the New Courier in the publication of certain newspapers, for a period of ten years beginning October 15, 1966.

The defendant Publishers Service Syndicate Inc., has not been served, and by agreement has been dropped as a party to the suit. The other defendant, New Courier, filed an answer to the complaint asserting a number of defenses, namely, failure of consideration, the sale to it by Internal Revenue Service of the contract right for which plaintiff seeks an accounting and three additional defenses, all of which arise out of the alleged failure of the plaintiff to act for a long period of time, these defenses being styled estoppel, laches, and absence of clean hands.

As a result of pretrial conferences, the court directed that we try initially only the issue of the validity of the Internal Revenue Service sale, since it was agreed that if the sale was valid, the plaintiff's suit must be dismissed. Thus, the issue for determination at the present time is the validity of that administrative sale to New Courier by Internal Revenue Service, which took place on December 30, 1968.

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The facts of the case are found to be as set forth herein in narrative form. For a number of years the Pittsburgh Courier Publishing Company, hereinafter called Old Courier, published a group of newspapers mainly serving black people in Pittsburgh and certain other areas of the country. Financial difficulties were encountered, with the result that by 1966 the Old Courier was hopelessly in debt, owing something like one million dollars to its creditors and over one hundred thousand dollars to the United States government for various taxes. The Internal Revenue Service had duly obtained liens on all assets of the Old Courier, real and personal, and was about to sell those assets to collect what it could on account of the taxes due, when a distress call was issued by one of the stockholders of the Old Courier to John Sengstacke, of Chicago.

Mr. Sengstacke was a well-established publisher of various newspapers mainly serving black people, having been in the newspaper business for over forty years, and having achieved a high position, not only in the publishing world, but also in civic and public affairs. He asked Internal Revenue Service to defer the sales which would terminate the life of the Old Courier, until he could prepare a proposition that might justify the Internal Revenue Service in permitting the Courier to continue in existence.

Mr. Sengstacke came to Pittsburgh from Chicago, accompanied by his attorney and his certified public accountant. Mr. Sengstacke believed that it was important to the protection of other black newspapers that the Old Courier be saved from ignominous destruction for non-payment of taxes, and Internal Revenue Service agreed to allow a chance for salvation, since that pro-

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vided the only reasonable chance that the taxes due could be collected.

Negotiations between Internal Revenue Service and the Sengstacke interests took place over a period of time and culminated in the agreement of October 15, 1966 and some related documents. Under the agreement the Old Courier sold its intangible assets, such as accounts receivable, circulation lists, name, etc., to Publishers Service Syndicate, Inc., who agreed to form or cause the formation of a new corporation to receive the assets and publish the Old Courier under the name Pittsburgh New Courier. That agreement also provided that for a ten year period the New Courier would pay to the seller one half the net profits, calculated as provided in the agreement.

The agreement specifically recognized and provided that the assets transferred were subject to liens held by the Internal Revenue Service and that the transaction had been worked out with the agreement of Internal Revenue Service to the effect that the Internal Revenue Service liens on the assets conveyed were not to be divested. Also part of the transaction was a lease from the seller to the buyer of certain business equipment that had been used by the Old Courier and was also subject to Internal Revenue Service liens. A letter from Internal Revenue Service agreeing and specifying conditions was part of the total agreement worked out.

The New Courier went into publication around October 15, 1966, in quarters that it obtained on the South Side of Pittsburgh. The real estate owned by the Old Courier was not to be used, and in fact it was subsequently sold by Internal Revenue Service on a marshall's sale and the proceeds of \$30,000.00 applied to the tax liability.

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During 1966, 1967 and 1968 the New Courier provided to Internal Revenue Service financial statements from time to time, since Internal Revenue Service had to decide whether or not to continue to refrain from foreclosing on the government's tax liens. Sometime in the latter part of 1968, Internal Revenue Service determined that the prospects for the future were not sufficiently favorable to justify further delay in enforcement of the liens, with the result that an administrative sale was conducted on December 30, 1968 at which the New Courier was the successful bidder and purchased the assets, including the contract right to the payment of one half the net profits, if any, for the ten year period beginning October 15, 1966.

In the meantime, the Old Courier had changed its name to Pittsburgh Liquidating Corporation, as contemplated in the 1966 written agreement. Its debts, of course, remained unpaid, and rose steadily by reason of the accrual of interest, since the corporation was now not engaged in any business and had no source of income, other than the hoped-for profits to be earned by the New Courier.

Not surprisingly, the New Courier was unable to turn a profit in the early months, and in the spring of 1967 a stockholder of the Pittsburgh Liquidating Corporation, S. B. Fuller, petitioned the Court of Common Pleas of Allegheny County to appoint a receiver for that corporation. The plaintiff was appointed temporary receiver on May 24, 1967, and by order of June 29, 1967 he was appointed permanent receiver. The court also appointed Patrick M. O'Donnell, Esquire as his attorney, Mr. O'Donnell having presented the petition of S. B. Fuller for the appointment of a receiver.

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At the time of his appointment, the plaintiff had little to do except to receive the claims, complaints, and inquiries of the many creditors, since by that time the company was not engaged in any kind of business at all.

The receiver did not personally do anything with respect to Internal Revenue Service or the New Courier, but left it to Mr. O'Donnell, his attorney, to take care of all that. Mr. O'Donnell was in fact in frequent communication with the appropriate officers of the Internal Revenue Service, who were keeping a continuous watch on developments. Both the District Director of Internal Revenue at the time and the revenue agent who conducted the sale testified, and the court finds it to be a fact that Internal Revenue Service regarded this as a highly important case. That is obviously true, since it cannot be expected that Internal Revenue Service would lightly put out of business the oldest black newspaper in the United States.

Thus, the New Courier from time to time supplied Internal Revenue Service with a report of its operations, since that was one of the conditions under which Internal Revenue Service agreed to defer a forced sale of the Courier assets. Mr. O'Donnell also obtained for the plaintiff financial reports from the New Courier for the period from October 15, 1966 to the end of that year, plus a report of operations for the year 1967. Both showed losses from operations.

In the meantime, the plaintiff received from Mr. Stengstacke an offer of \$30,000.00 to purchase all interest that the receiver might have, subject to the agreement of Internal Revenue Service as part of the transaction to discharge all federal tax liens and claims from the assets to be purchased. However, the receiver

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declined to accept this offer in 1967, hoping and expecting that in the long run a larger sum of money could be generated, it being his hope that the federal taxes could be paid off and at least something produced for the benefit of the creditors, many of whom were employees who had claims for unpaid wages.

In 1968 the Internal Revenue Service determined that the best interests of the government lay in selling what could be sold to realize what could be realized, since the prospects for the future did not seem attractive. Mr. O'Donnell was advised of this decision to sell. Accordingly, Internal Revenue Service carried out the necessary procedures under the Federal tax laws and regulations to levy upon, seize and sell those assets in the possession of the New Courier on which it had retained liens, and also the contract right of Pittsburgh Liquidating to receive one half of the net profits, if any, in the ten year period beginning October 15, 1966.

The levy was made on New Courier on December 17, 1968 and notice of seizure was sent and notice of sale on sealed bids was given to all persons in interest, in full compliance with the proper laws, rules and regulations of the Federal government.

At trial the plaintiff testified that he personally never received notice of the seizure or of the sale. However, the Internal Revenue Service officer who conducted the sale testified that he gave all notices that were appropriate at the time and executed a certificate to that effect. Naturally, he was unable to remember the specific details, never having been questioned on the subject until subpoenaed for appearance at trial, some five and a half years after the events. Also, he testified that it was the practice in all cases to be extremely

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careful about giving proper notice, so that there would be no problem with the validity of administrative sales. That was even more true in the instant case, because of the special importance of the case.

There was also received in evidence a letter written by Mr. O'Donnell indicating that he knew in December of 1968 that there was going to be a sale and that he received actual notice of the sale on the day it was conducted. Additionally, the requisite notice to the taxpayer by mail to the last known address of the taxpayer, Pittsburgh Liquidating Corporation, was sent to the address of the Old Courier operation on Centre Avenue, which by then had been the subject of a judicial sale. The plaintiff testified that he never made arrangements for change of address with postal authorities which would have caused him to get the notice that he testified he did not receive.

Following the sale to the New Courier for \$30,000.00 in December 1968, the New Courier ceased sending a report of its income to the receiver or his lawyer. When in 1969 the plaintiff did not receive a report of 1968 operations, he did not demand one of defendant, nor did he do so in 1970 for the year 1969, nor did he do so until 1971, at which time he wrote to his counsel asking that his counsel demand financial reports. This prompted the letter of Mr. O'Donnell to the plaintiff advising that Mr. O'Donnell had "forgotten about the case" and suggesting that the plaintiff demand the financial statement himself.

The evidence presented at trial included a copy of a letter from attorney O'Donnell to the attorney for the New Courier in Chicago dated January 24, 1969 in which Mr. O'Donnell expressed the view that the sale

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by Internal Revenue Service was perfectly valid. Neither party called Mr. O'Donnell to testify.

It is clear that plaintiff, although himself a lawyer, relied on Mr. O'Donnell throughout to handle all matters relating to Internal Revenue Service's continuing interest in the case, that Mr. O'Donnell was kept fully informed of developments, that he knew of the sale in December of 1968 and that therefore the receiver had sufficient notice of the sale.

We determine that the Internal Revenue Service sale to the defendant was valid, for a number of reasons. First of all, under federal law the certificate of the revenue officer that the sale was regularly conducted is *prima facie* evidence of the validity of the sale. See 26 U.S.C.A. (I.R.C. 1954) §6339(a)(1) and *Margiotta v. District Director of Internal Revenue, Brooklyn, N.Y.*, C.A.N.Y. 1954, 214 F.2d 518, which interpreted a similar provision of the 1939 Federal Tax Code. That presumption of validity may be rebutted, but it has not been rebutted in the instant case. There was actual notice to the attorney for the receiver, followed by a termination of the supplying to the receiver of information concerning the operation of the newspaper. This termination persisted over the next several years, and we must conclude that the fact of the case is that both the receiver and his counsel were of the opinion that the picture was hopeless as of the time of sale in 1968, the Internal Revenue Service lien at the time of sale being \$189,000.00, and rising daily at the rate of accruing interest. It was only later, in 1971, when the New Courier continued to appear with regularity and to include new major advertisers, that the receiver was

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moved to see whether there might not be some prospect of, using his words, a dry well having become a gusher.

Thus, we have found as a fact that the receiver did have that notice of sale that the federal law requires, and further that he has not rebutted the presumption of validity of the sale that arises from the certificate of Internal Revenue Service that the sale was proper.

There remain several legal questions to be disposed of. First, at the commencement of trial the defendant suggested that we are without jurisdiction of the subject matter, and cited Section 110 of Title 1 of Public Law 89-719; 26 U.S.C.A. 7421, and Section 201 of Title 2 of Public Law 89-719; 28 U.S.C.A. 2410, plus several cases. We have examined those authorities and are satisfied that nothing contained therein ousts us of jurisdiction. We have here a conventional suit for accounting in which the defendant asserts that it is the owner of the contract right asserted by the plaintiff.

The plaintiff advances the proposition that the Internal Revenue Service sale was beyond the jurisdiction of Internal Revenue Service because the asset sold had come under the jurisdiction of the state court receivership proceeding. It may be that there exists a principle that when an asset has come under the jurisdiction of the state court at a time when it was not yet subject to a federal tax lien, the Internal Revenue Service may not sell it. However, such a principle could not apply in cases such as the instant one. Here, the Internal Revenue Service had liens on all assets of the taxpayer; was about to enforce those lien rights, thereby destroying any remaining value in the taxpayer; agreed with the taxpayer and a third party to refrain

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from execution to give the taxpayer and the third party an opportunity to try to save the taxpayer; participated in negotiations to that end; and then marked time for a reasonable period to see whether the salvation could be effected. Under those circumstances, the intrusion of the state court during that period of contingent life could not properly be held to oust the Internal Revenue Service of its power, and indeed its duty, to sell the taxpayer's assets.

Another point advanced by plaintiff that we must reject is that the levy on the contract right to 50% of the net profits, if any, ought to have been made against the taxpayer rather than against the New Courier. The proposition is that the asset is the right to receive profits and that right was in the taxpaper-receiver. However, the levy was properly where it ought to have been, where it would be effective, that is, upon the entity which would ultimately do the paying. For example, when one levies on a bank account the levy is made upon the bank, not upon the depositor. The same situation is true in our case, since the right to receive those profits is comparable to the right to receive payment of money one has deposited in his bank account.

*Decree Nisi.***CONCLUSIONS OF LAW**

1. The court has jurisdiction of the parties and of the subject matter.
 2. The sale by Internal Revenue Service on December 30, 1968 of the right to 50% of the net profit as created by the agreement of October 15, 1966, was a valid sale and extinguished the right of the plaintiff to receive any such payments.
 3. The complaint must be dismissed.
 4. Costs upon the plaintiff.
-

Decree Nisi

AND Now, this 9th day of July, 1974, it is ordered that the complaint be dismissed.

BY THE COURT,
MCLEAN, J.

Opinion.

IN THE
COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

RICHARD F. JONES, Receiver of
Pittsburgh Liquidating Corporation,
Plaintiff
v.
NEW PITTSBURGH COURIER PUBLISHING
COMPANY, a Pennsylvania Corporation
and
PUBLISHERS SERVICE SYNDICATE, INC.,
an Illinois corporation,
Defendants

No. 261
April Term,
1973
In Equity
Issue No.
89401

Before MCLEAN and POPOVICH, J.J.

Opinion

MCLEAN, J.

We are considering exceptions filed by the plaintiff to the adjudication entered by the trial judge following a trial on the merits. We are satisfied that the points raised in the exceptions have been adequately and correctly treated in the adjudication.

Accordingly, we approve and confirm the findings of fact and conclusions of law set forth in the adjudication and therefore will dismiss the exceptions.

*Order.***Order of Court**

AND Now, this 3rd day of February, 1975, following oral argument and a consideration of the briefs, it is ordered that the exceptions filed by the plaintiff are dismissed for the reasons set forth in the adjudication and the decree nisi is affirmed as the final decree.

BY THE COURT,
MCLEAN, J.

APPENDIX C

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

RICHARD F. JONES, Receiver of
Pittsburgh Liquidating Corporation,
Appellant,

v.
NEW PITTSBURGH COURIER PUBLISHING
COMPANY, a Pennsylvania
Corporation,

No. 135
March Term,
1975

Order

AND Now, this 8th day of December, 1976, it is ordered as follows:

Petition denied,

Per Curiam
By THE COURT:

/s/
Deputy Prothonotary

*Appendix D.***APPENDIX D**

The pertinent provisions of the Internal Revenue Code, as amended, 26 U.S.C. follow:

CODE SEC. 6331. LEVY AND DISTRAINT.

* * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distress and seizure by any means. Except as otherwise provided in subsection (d) (3), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) *Successive Seizures.*—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

* * *

CODE SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation)

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to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * *

CODE SEC. 6335. SALE OF SEIZED PROPERTY.

(a) *Notice of Seizure.*—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) *Notice of Sale.*—The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in

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section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

* * *

CODE SEC. 6337. REDEMPTION OF PROPERTY.

(a) *Before sale.*—Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary or his delegate at any time prior to the sale thereof, and upon such payment the Secretary or his delegate shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) *Redemption of Real Estate After Sale.*—

(1) *Period.*—The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property at any time 120 days after the sale thereof.

(2) *Price.*—Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

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(c) *Record.*—When any lands sold are redeemed as provided in this section, the Secretary or his delegate shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

* * *

CODE SEC. 6338. CERTIFICATE OF SALE; DEED OF REAL PROPERTY.

(a) *Certificate of Sale.*—In the case of property sold as provided in section 6335, the Secretary or his delegate shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) *Deed to Real Property.*—In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary or his delegate shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

(c) *Real Property Purchased by United States.*—If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary or his delegate shall at the proper time execute a deed therefor, and without delay cause such deed to be duly recorded in the proper registry of deeds.

* * *

*Appendix D.***CODE SEC. 6339. LEGAL EFFECT OF CERTIFICATE OF SALE OF PERSONAL PROPERTY AND DEED OF REAL PROPERTY.**

(a) *Certificate of Sale of Property Other Than Real Property.*—In all cases of sale pursuant to section 6335 of property (other than real property), the certificate of such sale—

(1) *As evidence.*—Shall be *prima facie* evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and

(2) *As conveyances.*—Shall transfer to the purchaser all right, title and interest of the party delinquent in and to the property sold; and

* * *

CODE SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(b) *Return of property.*—If the Secretary or his delegate determines that property has been wrongfully levied upon, it shall be lawful for the Secretary or his delegate to return—

- (1) the specific property levied upon,
- (2) an amount of money equal to the amount of money levied upon, or
- (3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For pur-

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poses of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

* * *

CODE SEC. 6532. PERIODS OF LIMITATION ON SUITS.

* * *

(c) *Suits by Persons Other Than Taxpayer.*—

(1) *General Rule.*—Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.

(2) *Period when claim is filed.*—If a request is made for the return of property described in section 6343(b), the 9-month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary or his delegate to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

* * *

*Appendix D.***CODE SEC. 7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.**

* * *

(2) *Recovery of property.*—If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

* * *

REG. SEC. 301.6331-1 LEVY AND DISTRAINT

(a) *Authority to levy.*—(1) *In general.*—If any person liable to pay any tax neglects or refuses to pay such tax within 10 days after notice and demand, the district director to whom the assessment is charged or, upon his request, any other district director may proceed to collect the tax by levy upon any property, or rights to property, whether real or personal, tangible

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or intangible, either belonging to such person or with respect to which there is a lien provided by section 6321 or 6324 (or the corresponding provision of prior law) for the payment of such tax. As used in section 6331 and this section, the term "tax" includes any interest, additional amount, addition to tax, or assessable penalty, together with any costs and expenses that may accrue in addition thereto. For exemption of certain property from levy, see section 6334 and the regulations thereunder. Property subject to a Federal tax lien, which has been sold or otherwise transferred by the taxpayer, may be seized while in the hands of the transferee or any of subsequent transferees. However, see provisions under sections 6323 and 6324(a)(2) and (b) for protection of certain transferees against a Federal tax lien. Levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy including receivables, bank accounts, evidences of debt, securities, and accrued salaries, wages, commissions, and other compensation. A levy extends only to property possessed and obligations which exist at the time of the levy. Obligations exist when the liability of the obligor is fixed and determinable although the right to receive payment thereof may be deferred until a later date. For example, if a wage earner is paid on the Wednesday following the close of each workweek, a levy made upon his employer on Monday would reach his wages due for the prior workweek, although the employer need not satisfy the levy by paying over such amount to the district director until Wednesday. Similarly, a levy only reaches property subject to levy in the possession of the person levied upon at the time the levy is made. If, for example, a levy is made on a bank with respect to the account of a de-

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linquent taxpayer and the bank surrenders to the district director the amount of the taxpayer's balance at the time the levy is made, the levy is satisfied. The levy has no effect upon any subsequent deposit made in the bank by the taxpayer. Subsequent deposits may be reached only by a subsequent levy on the bank.

* * *

Supreme Court, U. S.
FILED
APR 2 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1222

NEW PITTSBURGH COURIER
PUBLISHING COMPANY, *Petitioner*

v.

RICHARD F. JONES, RECEIVER OF PITTSBURGH
LIQUIDATING CORPORATION, *Respondent*

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

RICHARD B. TUCKER, JR.

DONALD P. ERIKSEN

PETER J. KING

TUCKER, ARENSBERG & FERGUSON

Counsel for Respondent

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(ii)

QUESTIONS PRESENTED FOR REVIEW

- I. Is an administrative tax sale of a contract right to receive payments of money invalid if the Internal Revenue Service fails to serve the person entitled to receive the payments with the notice of seizure required by Section 6335 of the Internal Revenue Code?
- II. Are the notice provisions of Section 6335 of the Internal Revenue Code mandatory?
- III. Does a person whose contract right to receive payments is wrongfully sold pursuant to an invalid administrative tax sale have a remedy against the purchaser?

(iii)

STATEMENT OF THE CASE

Respondent is the receiver of Pittsburgh Liquidating Corporation, a Pennsylvania corporation, having been so appointed by order of the Court of Common Pleas of Allegheny County, Pennsylvania. Prior to being named Pittsburgh Liquidating Corporation, the corporation was known as the Pittsburgh Courier Publishing Company (the "Old Courier"). The Old Courier had been engaged in the newspaper publishing business and had published a weekly newspaper known as the "Pittsburgh Courier". In the summer of 1966 the financial condition of the Old Courier was in such a state that its survival was threatened. At that time, Publishers Service Syndicate, Inc. ("Publishers Service") entered into negotiations with the Old Courier with respect to the sale by the Old Courier of its remaining assets, including the use of the Courier name and the good will and circulation of the Old Courier. The negotiations culminated in the execution of an agreement dated October 15, 1966 (the "Agreement") and accompanying documents.

In consideration of the transfer of the assets to Publishers Service by the Old Courier and in accordance with the provisions of the Agreement, Publishers Service organized the Petitioner, the New Pittsburgh Courier Publishing Company. Pursuant to the Agreement, the Petitioner assumed the obligations of

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Publishers Service under the Agreement including the obligation to make certain payments. These payments included payments to be made for a period of ten years following October 15, 1966 (in quarterly installments as earned) in an amount equal to fifty (50%) percent of the net income (as defined in the Agreement) of the Petitioner after payment of all federal, state and city taxes. After the execution of the Agreement, the Old Courier ceased operating and its prior business was conducted by the Petitioner.

Respondent instituted this action in the Court of Common Pleas of Allegheny County, Pennsylvania by filing a Complaint in equity to obtain an accounting from the Petitioner under the provisions of the Agreement. Except for financial statements covering the periods from October 17, 1966 to December 31, 1966 and from January 1, 1967 to December 31, 1967, the Petitioner failed to supply Respondent with any information regarding the payments of net income to be made to Respondent. In addition, the Petitioner failed and refused to make any of the payments to Respondent required under the Agreement.

The Petitioner contends that it had no obligation to supply any additional information or to make any payments to Respondent after December 30, 1968. On that day the Internal

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Revenue Service ("IRS") conducted an "administrative sale" of certain assets of the Pittsburgh Liquidating Corporation including the right of the Respondent to receive payments under the Agreement; the purchaser at the sale was the Petitioner. No application to conduct the sale by the IRS was made to the court which had appointed Respondent receiver of the Pittsburgh Liquidating Corporation. Furthermore, Respondent was not notified that the sale was to be held and it was not until more than two years thereafter that he learned of it.

Upon appeal to the Supreme Court of Pennsylvania the decree of the Court of Common Pleas of Allegheny County, Pennsylvania dismissing the Complaint was vacated. In his brief to the Supreme Court of Pennsylvania, Respondent challenged the validity of the IRS sale on several grounds including (i) the failure of the IRS to observe the notice requirements for seizure and sale of property, (ii) violation of the constitutional requirement of due process and (iii) the lack of authority of the IRS to sell the property because at the time of levy on, and sale of, such property it was in the exclusive possession and control of the Court of Common Pleas of Allegheny County, Pennsylvania and the Respondent by virtue of the prior appointment of Respondent as receiver of the Pittsburgh Liquidating Corporation. Although the

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only issue presently before this Court involves the notice of seizure required to be given pursuant to Section 6335 of the Internal Revenue Code, Respondent hereby preserves all other issues presented to the Supreme Court of Pennsylvania.

ARGUMENT

- I. AN ADMINISTRATIVE TAX SALE OF A CONTRACT RIGHT TO RECEIVE PAYMENTS OF MONEY IS INVALID IF THE INTERNAL REVENUE SERVICE FAILS TO SERVE THE PERSON ENTITLED TO RECEIVE THE PAYMENTS WITH THE NOTICE OF SEIZURE REQUIRED BY SECTION 6335 OF THE INTERNAL REVENUE CODE.

The opinion of the Supreme Court of Pennsylvania should not be reviewed by this Court. In reaching its decision that Court recognized the critical distinction between a right to receive payment and an obligation to make payment, which interests are separate and distinct and are not equivalent. Petitioner fails to make such a distinction in its argument and such failure is the basic error in its Petition.

a. **The IRS Failed to Give Notice of Seizure to Respondent.**

Before property may be validly sold by the IRS pursuant to an administrative sale certain statutory notices must be given. Section 6335 of the Internal Revenue Code of 1954 ("IRC"), 26 U.S.C.A. §6335, requires that two separate notices be given: (1) notice of seizure and (2) notice of sale. The notice provisions of Section 6335 are mandatory and unless there is strict compliance therewith a taxpayer's property may not be validly sold. Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975); U. S. v. Conry,

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74-1 USTC ¶9187 (N.D. Calif. 1973);
Johnson v. Gartlan, 470 F.2d 1104 (4th Cir. 1973) cert. denied, 414 U.S. 865; Margiotta v. District Director of Internal Revenue, 214 F.2d 518 (2nd Cir. 1954).

Subsection 6335(a) of the IRC, 26 U.S.C.A. §6335(a), provides, in part, that:

NOTICE OF SEIZURE.--As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof)....

At the sale conducted on December 30, 1968, the IRS attempted to sell certain personal property of the Pittsburgh Liquidating Corporation. With respect to a seizure of personal property, subsection 6335(a) of the IRC requires that written notice be given to the owner of the property or to the possessor thereof. The notice of seizure involved in this case described three groups of assets including the following asset identified as item B:

That portion of the interest in said contract of October 15, 1966 [the Agreement] for the payment of one-half of the net profits by

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the New Pittsburgh Courier Publishing Company to the Pittsburgh Liquidating Corporation for a period of ten (10) years.

This asset which constituted a right to receive payments was obviously owned by the Pittsburgh Liquidating Corporation since it was part of the consideration to the Pittsburgh Liquidating Corporation under the Agreement for the transfer of property to Publishers Service and since it had never been conveyed by the Pittsburgh Liquidating Corporation or Respondent.

In properly applying the law to the facts in this case, the Supreme Court of Pennsylvania held that Respondent possessed item B. From and after his appointment as receiver, which occurred approximately one and one-half years before the notice of seizure was served, item B was in Respondent's possession and all persons were enjoined from taking possession of any assets of the Pittsburgh Liquidating Corporation, including item B. The Petitioner never possessed item B; in fact, the Petitioner was obligated to make the payments described in item B, not to receive them. Consequently, for the notice of seizure to be effective as to item B, it had to be given to the Pittsburgh Liquidating Corporation or Respondent; neither the Pittsburgh Liquidating Corporation nor Respondent however was given such notice.

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b. Under The Applicable Law
Respondent Possessed Item B.

In its argument Petitioner quotes from the opinion of this Court in the case of Aquilino v. United States, 363 U.S. 509 (1960) to challenge the use of that case by the Supreme Court of Pennsylvania as authority for applying Pennsylvania law in determining that item B was possessed by Respondent.

Petitioner, however, not only used the quote out of context but also failed to complete the remainder of the sentence from which the quoted material was taken. The balance of the sentence as well as the remainder of the paragraph from which it was taken confirms that state law determines the nature of property interests and that once such interests are determined federal law is then to be applied to determine the priority of liens asserted against such property interests; in the instant case there is no issue as to priority of liens.

However, once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property".

[Footnotes omitted. Underscored material designates balance of sentence omitted by Petitioner].
363 U.S. at 513-14.

Argument

The Supreme Court of Pennsylvania held that under the law of Pennsylvania the contract right to receive payments is possessed by the obligee (Respondent), not the obligor (Petitioner).

II. THE NOTICE PROVISIONS OF SECTION 6335 OF THE INTERNAL REVENUE CODE ARE MANDATORY.

Despite Petitioner's argument to the contrary, the notice provisions of Section 6335 of the IRC are mandatory and require strict compliance; there is no conflict among the Circuit Courts of Appeal as to this point. The court's opinion in Johnson v. Gartlan, 470 F.2d 1104 (5th Cir. 1973) recognizes the general rule that strict compliance is required to validate tax sale; the Fourth Circuit nevertheless held the tax sale valid in the Johnson case notwithstanding the failure of the IRS to strictly comply with the notice requirements because the taxpayer subsequently ratified the sale. 470 F.2d at 1104 and 1106.

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III. RESPONDENT DOES HAVE A REMEDY AGAINST PETITIONER FOR THE WRONGFUL SALE PURSUANT TO AN INVALID ADMINISTRATIVE TAX SALE OF THE CONTRACT RIGHT TO RECEIVE PAYMENTS.

Petitioner would deny to Respondent the right to recover the loss sustained as a result of the wrongful sale of item B. Such a position has no support in law. The action instituted by Respondent was commenced in a state court to obtain an accounting of amounts due him under the Agreement and to recover such amounts; as one defense Petitioner asserted that as a result of the administrative tax sale conducted by the IRS it owned the right under the Agreement to receive payments of fifty (50%) percent of the net profits generated by it. Such a suit is properly before the state court being a conventional action brought on a contract.

In Margiotta v. District Director of Internal Revenue, 214 F.2d 518 (2nd Cir. 1954) the court invalidated a tax sale because the IRS failed to strictly adhere to the notice requirements and permitted the recovery of personal property sold from a person who had paid the purchase price therefor and to whom

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possession of the property had been transferred. The Second Circuit held that the certificate of sale issued by the IRS for the personal property sold by it is not conclusive evidence of the validity of the sale and has no effect if it is shown (as it was in the present case) that the IRS failed to observe the notice requirements.

Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975), affirms the principles of Margiotta and permitted the recovery by the taxpayer of property sold at an invalid sale. In Reece, the sale of the taxpayer's property was vacated and the Fifth Circuit, after noting the existence of a citizen's right to property "free from arbitrary governmental interference", stated at page 971:

In recognition of the Damoclean nature of this ultimate weapon [the power to summarily seize and sell a taxpayer's property], Congress has imposed precise strictures on the seizure and sale of property to satisfy legitimate tax deficiencies. The §6335 notice requirements are designed to protect the taxpayer by giving him an opportunity to be present at the tax sale and bid on the property.... The language of

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this section is clear and mandatory; absent literal compliance with its provisions, the government sale of land cannot stand.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The Supreme Court of Pennsylvania properly held that Respondent's property was wrongfully sold without due process pursuant to an invalid administrative tax sale conducted by the IRS without compliance with the mandatory notice requirement of the IRC.

Respectfully submitted,

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